

No. 16509

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United States  
Court of Appeals  
for the Ninth Circuit

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ROSEWOOD HOTEL, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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Transcript of Record

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Petition to Review a Decision of the Tax Court  
of the United States

FILED

SEP 25 1959

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## APPEARANCES

JAMES J. ARDITTO,  
727 W. Seventh St.,  
Los Angeles Calif.,  
For the Petitioner.

CHARLES K. RICE,  
Asst. Atty. General,  
Dept. of Justice, Tax Division;

MEYER ROTHWACKS,  
Atty., Dept. of Justice,  
Dept. of Justice, Tax Division,  
Washington 25, D.C.,  
For the Respondent.





The Tax Court of the United States

Docket No. 77084

ROSEWOOD HOTEL, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW OF  
DEFICIENCY DETERMINATION

The above-named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Respondent in his Notice of Deficiency (Internal Revenue Service Symbols A: R: 90D: CTF) stamp-dated June 12, 1958, and as a basis of its proceeding alleges as follows:

I. The Petitioner is a corporation, with its principal office located in the City of Los Angeles, State of California, to wit: 3421 West Second Street, Los Angeles 4, California.

The returns of Petitioner herein involved for the taxable years ended November 30, 1954, and November 30, 1955, were filed with the District Director of Internal Revenue at Los Angeles, California.

II. The Notice of Deficiency (a copy of which is marked "Exhibit A" and attached hereto) was

personally served on Petitioner on July 17, 1958, in accordance with the acknowledgment of such service so dated and signed by R. A. Goddard, Revenue Agent.

III. The taxes and penalties in controversy, and for the specific years ending, are set out as follows:

Year Ended: 11-30-54.

Type of Tax: Income and Excess Profits Tax.

Deficiency: \$42,220.46.

5% Penalty: \$2,111.02.

Year Ended: 11-30-55.

Type of Tax: Income Tax.

Deficiency: \$3,785.06.

5% Penalty: \$189.25.

That the total amount of taxes and penalties in controversy is the sum of \$46,005.52 in income and excess profits taxes and \$2,300.27 of 5% penalty.

IV. The determination of the tax set forth in said Notice of Deficiency is based upon the following errors:

(a) The Commissioner erred in failing to determine that any Notice of Deficiency for the taxable year ended November 30, 1954, was barred by the three-year statute of limitations prescribed by the Internal Revenue Code of 1939 and 1954.

(b) The Commissioner erred in determining that any alleged underpayment of tax was due to negligence or intentional disregard of rules

and regulations (without intent to defraud) within the purview of Sec. 293(a) or Sec. 6653(a) of the Internal Revenue Codes of 1939 and 1954.

(c) The Commissioner erred in determining that during the fiscal year ended November 30, 1954, Petitioner allegedly erroneously deducted the sum of \$96,000.00 as "lease expense."

(d) The Commissioner erred in determining that for the fiscal year ended November 30, 1955, Petitioner allegedly erroneously deducted the following items:

Lease Expense .....	\$16,000.00
Net Operating Loss .....	\$ 4,973.62

(e) The Commissioner erred in determining that there is due from Petitioner any deficiency of tax or penalty during either of the fiscal years ended November 30, 1954, or November 30, 1955.

V. The facts upon which Petitioner relies as a basis for this proceeding are as follows:

(a) The fundamental point of dispute between Petitioner and Respondent is whether the Notice of Deficiency for the fiscal year ended November 30, 1954, which was personally served on Petitioner on July 17, 1958, was barred by the pertinent three-year statute of limitations prescribed by the Internal Revenue Code.

(b) That the deductions for lease expense claimed by Petitioner for the fiscal years ended

November 30, 1954, and November 30, 1955, and which are proposed to be disallowed by the Respondent herein, can be supported by Petitioner and Petitioner can establish that such deductions were properly claimed.

(c) Petitioner's returns for the fiscal years ended November 30, 1954, and November 30, 1955, have been correctly filed and correctly set out Petitioner's correct taxable income and tax.

Wherefore, Petitioner prays this Court may hear the proceeding and redetermine the tax and penalty for the fiscal years ended November 30, 1954, and November 30, 1955, to be as follows:

Year Ended: 11-30-54.

Type of Tax: Income and Excess Profits Tax.

Amount of Tax: 0.

Amount of Penalty: 0.

Year Ended: 11-30-55.

Type of Tax: Income Tax.

Amount of Tax: 0.

Amount of Penalty: 0.

/s/ JAMES J. ARDITTO,  
Of Waters, Arditto & Waters,  
Attorneys for Petitioner.

Duly verified.

[Endorsed]: Filed October 7, 1958.

Served October 8, 1958.

EXHIBIT A

U. S. Treasury Department  
Internal Revenue Service  
District Director  
P. O. Box 231 - Main Office  
Los Angeles 53, California

In Reply Refer to: A:R:90D:CTF.  
MA 5-8971, Ext. 1210.

Rosewood Hotel, Inc.  
3421 West Second Street  
Los Angeles 4, California

Gentlemen:

You are advised that the determination of your income tax liability for the taxable years ended November 30, 1954, and November 30, 1955, discloses deficiencies in tax aggregating \$46,005.52 and penalties aggregating \$2,300.27, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia

in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the District Director of Internal Revenue, Audit Division, at the above address. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earliest.

Very truly yours,

RUSSEL C. HARRINGTON,  
Commissioner.

By.....,  
District Director of Internal  
Revenue.

Enclosures:

Statement.

IRS Publication No. 160.

Agreement Form.

STATEMENT

A :R:90D :CTF

Rosewood Hotel, Inc.  
3421 West Second Street  
Los Angeles 4, California

Tax Liability for the Taxable Years Ended:

November 30, 1954

November 30, 1955

Year Ended:	Liability	Assessed	Deficiency	5% Penalty
11-30-1954 Income and excess profits tax ....	\$42,220.46	None	\$42,220.46	\$2,111.02
11-30-1955 Income tax	3,785.06	None	3,785.06	189.25
	<hr/>		<hr/>	<hr/>
Total .....	\$46,005.52	None	\$46,005.52	\$2,300.27
				<hr/>
Total .....				\$48,305.79

In making this determination of your income and excess profits tax and penalty liability, careful consideration has been given to the report of examination dated May 15, 1958.

The five percent penalty shown herein is asserted in accordance with the provisions of section 293(a) of the Internal Revenue Code of 1939 and section 6653(a) of the Internal Revenue Code of 1954.

ADJUSTMENTS TO NET INCOME  
Taxable year ended November 30, 1954

	Income tax Net Income	Excess Profits Net Income
Net income as disclosed by return (loss) .....	\$(4,973.62)	\$(4,973.62)
Unallowable deductions:		
(a) Lease Expense disallowed.....	96,000.00	96,000.00
(b) Adjustment for interest on borrowed capital (75% of \$59.33) .....		44.50
	<hr/>	<hr/>
Net income adjusted .....	\$91,026.38	\$91,070.88

## EXPLANATION OF ADJUSTMENT

(a) It has been determined that the deduction claimed in your return for "Lease Expense" in the amount of \$96,000.00 does not represent a proper deduction under the provisions of section 23 of the Internal Revenue Code of 1939.

(b) In computing excess profits net income an adjustment for interest on borrowed capital is made under the provisions of section 433(a) of the Internal Revenue Code of 1939.

## COMPUTATION OF TAX

Taxable year ended November 30, 1954

Income tax:

Net income adjusted .....	\$91,026.38
Combined normal tax and surtax:	
52% of \$91,026.38 less \$5,500.00 .....	\$41,833.72
Normal tax and surtax .....	\$41,833.72
Excess profits tax:	
Excess profits net income adjusted .....	\$91,070.88
Less: Excess profits credit .....	25,000.00
Adjusted excess profits net income .....	\$66,070.88
Tentative tax under Sec. 430(a) (1), I.R.C. of 1939:	
(1) 30% of \$66,070.88 .....	\$19,821.26
Tentative tax under Sec. 430(a) (2), I.R.C. of 1939:	
(2) 18% of \$91,070.88 .....	\$16,392.76
Tentative tax under Sec. 430(a) (3), I.R.C. of 1939:	
(3) 5% of \$91,070.88 .....	\$ 4,553.54
Tentative excess profits tax (lesser of items (1), (2), and (3)) .....	\$ 4,553.54
Number of days in taxable year .....	365
Number of days before January 1, 1954 .....	31
31/365 of \$4,553.54 .....	\$ 386.74
Excess profits tax .....	\$ 386.74



Summary

Total normal tax and surtax .....	\$41,833.72
Excess profits tax .....	386.74
	<hr/>
Correct income and excess profits tax liability .....	\$42,220.46
Income and excess profits tax assessed:	
Original, account No. CN 107852 .....	None
	<hr/>
Deficiency of income and excess profits tax .....	\$42,220.46
5% Penalty .....	\$ 2,111.02

ADJUSTMENTS TO TAXABLE INCOME

Taxable year ended November 30, 1955

Taxable income as disclosed by return (loss) .....	\$(8,356.75)
Unallowable deductions:	
(a) Lease Expense disallowed .....	16,000.00
(b) Net operating loss deduction .....	4,973.62
	<hr/>
Taxable income adjusted .....	\$12,616.87

EXPLANATION OF ADJUSTMENTS

(a) It has been determined that the deduction claimed in your return for "Lease Expense" in the amount of \$16,000.00 does not represent a proper deduction under the provisions of the Internal Revenue Code of 1954.

(b) It has been determined that you sustained no net operating loss in the taxable year ended November 30, 1954, allowable as a net operating loss carry-over and deduction in the taxable year ended November 30, 1955 as claimed by you.

COMPUTATION OF TAX

Taxable year ended November 30, 1955

Taxable income adjusted .....	\$12,616.87
Combined normal tax and surtax:	
30% of \$12,616.87 .....	\$ 3,785.06
Correct income tax liability .....	\$ 3,785.06

Income tax assessed:

Original, account No. CN 111587 .....	None
Deficiency of income tax .....	\$ 3,785.06
5% Penalty .....	\$ 189.25

In re: Rosewood Hotel, Inc.  
Los Angeles, California

A:R: 90D: CTF

**WAIVER OF RESTRICTIONS ON ASSESSMENT AND  
COLLECTION OF DEFICIENCY IN TAX AND  
ACCEPTANCE OF OVERASSESSMENT**

Pursuant to section 6213(d) of the Internal Revenue Code of 1954 or corresponding provisions of prior internal revenue laws, the restrictions provided in section 6213(a) of the Internal Revenue Code of 1954 or corresponding provisions of prior internal revenue laws are hereby waived and consent is given to the assessment and collection of the following deficiencies, together with interest on the tax as provided by law; and the following overassessments are accepted as correct:

**DEFICIENCIES**

Type of Tax	Year Ended	Tax	Penalty	Total
Income and excess profits tax	Nov. 30, 1954	\$42,220.46	\$2,111.02	\$44,331.48
Income tax	Nov. 30, 1955	3,785.06	189.25	3,974.31

In re: Rosewood Hotel, Inc.  
Los Angeles, California

A:R: 90D: CTF

**WAIVER OF RESTRICTIONS ON ASSESSMENT AND  
COLLECTION OF DEFICIENCY IN TAX AND  
ACCEPTANCE OF OVERASSESSMENT**

Pursuant to section 6213(d) of the Internal Revenue Code of 1954 or corresponding provisions of prior internal revenue laws, the restrictions provided in section 6213(a) of the Internal Revenue Code of 1954 or corresponding provisions of prior in-

ternal revenue laws are hereby waived and consent is given to the assessment and collection of the following deficiencies, together with interest on the tax as provided by law; and the following overassessments are accepted as correct:

## DEFICIENCIES

Type of Tax	Year Ended	Tax	Penalty	Total
Income and excess profits tax	Nov. 30, 1954	\$42,220.46	\$2,111.02	\$44,331.48
Income tax	Nov. 30, 1955	3,785.06	189.25	3,974.31

This copy to be retained by taxpayer.

Received and Filed October 7, 1958, T.C.U.S.

Served October 8, 1958.

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[Title of Tax Court and Cause.]

MOTION TO DISMISS FOR LACK OF  
JURISDICTION

The Respondent Moves that the above-entitled case be dismissed for lack of jurisdiction.

In Support Thereof, respondent respectfully shows unto the Court:

1. That the statutory notice of deficiency from which this appeal is taken was mailed by registered mail to the petitioner on June 12, 1958.

2. That the postmark date stamped on the envelope containing the petition was October 3, 1958, according to the stamp impressed upon respondent's copy of the petition, which date was the 113th day after the mailing of the statutory notice of deficiency. Further, the petition was received and

filed on October 7, 1958, according to the official stamp of the Tax Court.

3. Accordingly, the petition herein was untimely filed within the requirements of Section 6213(a) and 7502(a) of the Internal Revenue Code of 1954, and the Court, therefore, is without jurisdiction to entertain this appeal.

Wherefore, it is prayed that this motion be granted.

/s/ ARCH M. CANTRALL,  
Chief Counsel,  
Internal Revenue Service.

Received and Filed December 8, 1958, T.C.U.S.

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[Title of Tax Court and Cause.]

OPPOSITION TO MOTION TO DISMISS  
FOR LACK OF JURISDICTION

Comes now Rosewood Hotel, Inc., Petitioner above named, and opposes Respondent's motion to dismiss the above-entitled proceed for alleged lack of jurisdiction. This motion is based on the following grounds:

1. That the petition herein was timely filed within the requirements of Sections 6213(a) and 7502(a) of the Internal Revenue Code of 1954.

2. That the Court, therefore, is with jurisdiction to entertain this appeal.

3. That, in support of this opposition, there is attached hereto Exhibit A, which is an affidavit of Nathan Stein.

Wherefore, It Is Prayed that Respondent's motion not be granted and that a hearing on this motion be held in Los Angeles and preferably at the time that the matter is set on the Los Angeles calendar of the above-entitled court.

Dated: January 28, 1959.

/s/ JAMES J. ARDITTO,  
Of Waters, Arditto & Waters,  
Attorneys at Law.

EXHIBIT A

[Title of Tax Court and Cause.]

AFFIDAVIT IN SUPPORT OF OPPOSITION  
TO MOTION TO DISMISS

State of California,  
County of Los Angeles—ss.

Nathan Stein, being duly sworn, deposes and says:

That on the 17th day of July, 1958, there was personally served upon me by Revenue Agent R. A. Goddard the statutory notice of deficiency dated June 12, 1958, directed to Rosewood Hotel, Inc., and covering the fiscal years ended November 30, 1954, and November 30, 1955.

That attached to this affidavit is a true and correct copy of "receipt" prepared by said Revenue Agent Goddard and which was signed by your affiant upon being served with such statutory notice on July 17, 1958.

That said Agent Goddard signed such receipt at the time of such service.

/s/ NATHAN STEIN.

Subscribed and sworn to before me this 28th day of January, 1959.

[Seal] /s/ CHARLOTTE L. SMITH,  
Notary Public in and for the State of California,  
County of Los Angeles.

My Commission Expires September 4, 1960.

Received and Filed February 2, 1959, T.C.U.S.

Served February 3, 1959.

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[Title of Tax Court and Cause.]

### ORDER OF DISMISSAL

This case was called from the motions calendar at Washington, D. C., on February 4, 1959, for hearing on respondent's motion to dismiss the case for lack of jurisdiction alleging that the petition was not filed within the time prescribed by statute. The motion was argued by counsel for respondent. Petitioner filed on February 2, 1959, a request that the hearing on respondent's motion be held in Los

Angeles, California, and also a memorandum in opposition to respondent's motion. It appears from the record and the evidence before the Court that the petition was not filed with the Court within the time prescribed by statute. After due consideration, it is

Ordered: That petitioner's request filed February 2, 1959, is denied; respondent's motion is granted and the case is dismissed for lack of jurisdiction.

/s/ C. R. ARUNDELL,  
Judge.

Entered February 9, 1959.

Served February 10, 1959.

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[Title of Tax Court and Cause.]

MOTION TO VACATE ORDER OF  
DISMISSAL (RULE 19(e))

The Petitioner Moves that:

(1) The above-entitled Court should vacate its "Order of Dismissal" entered herein on February 9, 1959.

This Motion will be made upon the following grounds:

(a) New evidence has been discovered which was not available prior to this time;

(b) The Order of Dismissal is erroneous in law.

In Support of Said Motion, Petitioner respectfully submits the following for the Court's consideration:

(1) That, at the time Petitioner opposed the Respondent's Motion to Dismiss, Petitioner did not know that the Respondent had attempted, prior to July 17, 1958, to serve Petitioner by mailing the 90-day letter to 3421 West 2nd Street, Los Angeles, California, the former address of Petitioner.

(2) That knowledge of such attempt was first discovered when Petitioner's attorney had a telephonic conversation with Mr. Maiden (Assistant Regional Counsel) of Respondent's Los Angeles District Office shortly after receiving the Order of Dismissal of February 9, 1959.

(3) That Mr. Maiden, at that time, informed Petitioner's attorney that on June 12, 1958, the Internal Revenue Service had mailed, by registered mail, the 90-day letter in question to 3421 West 2nd Street, Los Angeles, but that it had been returned, marked "Not Known at This Address." That that was the reason why Mr. Goddard, Revenue Agent, personally served Nathan Stein on July 17, 1958, with the same original copy of said 90-day letter.

(4) That during the period of approximately December, 1957, through March 15, 1958, Revenue



Agents Goddard and Keller made an audit of Petitioner, for the fiscal taxable years ended November 30, 1954, and November 30, 1955, and during the course of said audit and at that time said Revenue Agents were told that:

(a) In February, 1955, the leasehold on the Casa Blanca Hotel, which was practically the sole asset of Petitioner, was lost because such property so leased was taken away from Petitioner's lessor;

(b) That from March, 1955, to the present time Petitioner has had no business activities (other than winding up its affairs during the first two or three months succeeding February of 1955) and for all practical purposes Petitioner did not exist as a corporation, or any other type of entity;

(c) That long prior to 1958 the portion of the building at 3421 West 2nd Street, Los Angeles, California, which was occupied as an office by Petitioner—when it was functioning as a corporation—was completely destroyed by fire;

(d) That the same fire that destroyed said office location of Petitioner also destroyed all the books and records of Petitioner;

(e) That Petitioner did not file any Federal Income Tax Return for the fiscal year ended November 30, 1956, for the reason that it was practically extinct, was not functioning, had no business or other type of activity and was, in effect, a mere shell corporation. Further, that no returns would be filed for any future year, because, as

aforesaid, the corporation was practically extinct and not functioning;

(f) That Nathan Stein was the sole stockholder of Petitioner and had been and was an officer and director of Petitioner, and that his (Nathan Stein's) office or place of business was at the Temple Hospital on Hoover Street in Los Angeles;

(g) That any 90-day letter for Petitioner should be mailed or delivered to Nathan Stein at Temple Hospital on Hoover Street in Los Angeles.

(5) That all of the foregoing will, at the hearing of these motions, be established by testimony of Revenue Agents Goddard and Keller, Nathan Stein, Erwin Hassen, Harvey Riley and a Mr. Newman.

(6) Accordingly, the petition herein was timely filed within the requirements of Sections 6213(a) and 7502(a) of the Internal Revenue Code of 1954, and the Court, therefore, has jurisdiction of the same.

See: *Boren vs. Riddell*, 241 Fed. (2nd) 670.

Whereupon, it is prayed that this Motion be granted.

/s/ JAMES J. ARDITTO,  
Attorney for Petitioner.

Received and Filed March 2, 1959, T.C.U.S.

[Title of Tax Court and Cause.]

MOTION FOR LOS ANGELES HEARING ON  
MOTION TO VACATE ORDER OF DIS-  
MISSAL

Comes now Petitioner, above named, through its undersigned attorney, and moves the Court as follows:

1. That the hearing on Petitioner's Motion to Vacate Order of Dismissal be calendared at Los Angeles, California, in lieu of Washington, D. C.

2. That, pursuant to Rule 27 (a) (1), good cause for holding the hearing elsewhere than in Washington, D. C., is set forth in the affidavit attached hereto in support of this motion.

3. That for said good cause the motion for Los Angeles hearing, as well as the Motion to Vacate Order of Dismissal, should be held in Los Angeles, California.

Dated: March 13, 1959.

/s/ JAMES J. ARDITTO,  
Attorney for Petitioner.

Affidavit in Support of Motion for  
Los Angeles Hearing

State of California,  
County of Los Angeles—ss.

James J. Arditto, being duly sworn, deposes and says:

That he is the attorney for the petitioner in the case now pending in the Tax Court of the United States, entitled "Rosewood Hotel, Inc., vs. Commisioner, Docket No. 77084."

That your affiant is of the opinion that the following sufficiently states good cause for holding any hearings in the Rosewood Hotel, Inc., matter in Los Angeles, California, rather than in Washington, D. C.:

That in support of the Motion to Vacate Order of Dismissal, your affiant intends to produce the following witnesses on behalf of Petitioner's motion:

- (a) R. A. Goddard.
- (b) Erwin E. Hassen.
- (c) Betty Stein.
- (d) Harvey Riley.
- (e) Gordon Keller.
- (f) Edward G. Nedow.
- (g) Nathan Stein.

(h) Personnel in the local office of the Internal Revenue Service who handled the Notice of Deficiency in question and whose names are unknown to your affiant at this time.

That all of said witnesses are residents of the City of Los Angeles, California, and that, in order to bring them to Washington, D. C., Petitioner would have to expend approximately \$7,500.00. That Petitioner, however, has been a defunct cor-

poration ever since on or about February, 1955, and has no known assets of any type or description. That in order to bring such witnesses to Washington, D. C., a present or former officer and/or director of said petitioner would have to supply such expense money out of his or her own personal funds. That said officers and/or directors have stated that they would not advance such moneys on behalf of the petitioner.

That under these circumstances Petitioner would be deprived of the testimony of said witnesses and thus would also be deprived of a fair hearing before the Tax Court and, as a practical matter, might as well abandon its motion.

That even if the Tax Court would authorize the use of affidavits in support of said motion, your affiant, as attorney for Petitioner, would insist upon the "live" testimony of at least Witnesses Goddard and Keller, and also other personnel in the local office of the Internal Revenue Service who have personal knowledge of the mailing of the so-called Deficiency Notice in question.

Furthermore, your affiant would want to produce—for the consideration of the Tax Court—all documentary evidence surrounding and relating to the mailing of the Deficiency Notice in question and this can best be done, in the opinion of your affiant, by having the hearing held in Los Angeles, California.

Your affiant does not use the airlines in traveling and, therefore, would be required to expend at

least ten days away from his office for the purpose of presenting a matter which, at the most, will take up one day. Furthermore, Petitioner is without funds to pay your affiant for said services and said ten-day period of time.

Your affiant has many clients other than Petitioner and his schedule is such for the next several months that he cannot afford to spend ten days on this Washington trip when only one day would be expended if the matter were heard in Los Angeles.

All of the witnesses proposed to be placed on the stand by Petitioner in this matter should not be required to expend the time going back and forth to Washington, D. C., in a matter of this type when everybody's convenience would be best served by holding the hearing in Los Angeles, California.

For each and all of the foregoing reasons, your affiant respectfully believes and, therefore, respectfully submits that he has established good cause for the holding of the hearing in question in Los Angeles, California, rather than in Washington, D. C. Your affiant further respectfully states that unless this motion is granted he will request permission of the client to withdraw from the case for the obvious reason that your affiant respectfully believes and respectfully submits that neither he nor any other attorney could properly represent the petitioner in Washington, D. C.,—in this matter—without the vitally necessary witnesses mentioned.

Your affiant respectfully notes that he cannot come to Washington, D. C., to argue this motion for change of hearing from Washington, D. C., to Los Angeles, California, for the same economical and professional reasons mentioned above and, therefore, respectfully submits this motion on this affidavit and respectfully requests the Court that, in order that Petitioner may have a fair hearing in this matter, the motion to hold the hearing in Los Angeles, California, should be granted.

/s/ JAMES J. ARDITTO.

Subscribed and sworn to before me this 13th day of March, 1959.

[Seal] /s/ CHARLOTTE L. SMITH,  
Notary Public in and for the County of Los Angeles,  
State of California.

My Commission Expires September 4, 1960.

Received and Filed March 16, 1959, T.C.U.S.

\_\_\_\_\_

[Title of Tax Court and Cause.]

### ORDER

The Commissioner filed a motion to have this case dismissed for lack of jurisdiction. He alleged as his reason for such a dismissal that the petition had not been filed within 90 days after the registered mailing of the notice of deficiency to the petitioner. The petitioner filed a document in oppo-

sition to the motion and, thereafter, hearing on the motion was held at which time facts were proven showing that the petition had not been filed within 90 days of the date on which the notice of deficiency had been mailed to the petitioner by registered mail as required by law, and the Court entered an order on February 9, 1959, dismissing the case for lack of jurisdiction.

Thereafter, the petitioner filed a motion to vacate the order of dismissal and to reinstate the case within the jurisdiction of the Court on the ground that the petition was timely filed. The facts alleged by the petitioner in support of this motion are to the effect that the petitioner, prior to June 12, 1958, had told Revenue Agents Goddard and Keller that all communications, and particularly any notice of deficiency relating to the petitioner, should be mailed to Nathan Stein at Temple Hospital on Hoover Street in Los Angeles; but the notice of deficiency on which this proceeding is based was mailed by registered mail to the petitioner at 3421 West 2nd Street, Los Angeles 4, California, instead of as directed by the petitioner; that notice was returned by the post office to the sender marked "Not Known at This Address"; and the notice was then delivered in person by Revenue Agent Goddard to Nathan Stein on a date which was within 90 days of the filing of the petition.

The petitioner, apparently, does not realize that the Tax Court would have no jurisdiction in this case if he proved that the Commissioner failed to



mail a notice of deficiency to the petitioner by registered mail at its address last known to the Commissioner, or that the notice of deficiency was not mailed to the petitioner's last known address within the knowledge of the Commissioner but was mailed by registered mail to some other address, was returned to the sender by the post office and then was delivered to the petitioner in some way other than by registered mail. Thus, the order of dismissal for lack of jurisdiction already entered in this case is proper regardless of whether it is justified on the ground that the petition had not been filed within 90 days of the date of the mailing of the notice of deficiency by registered mail or that the Commissioner never mailed a notice of deficiency by registered mail to the petitioner's last known address.

The petitioner has requested that the hearing on its motion be heard in Los Angeles whereas the Clerk of the Court had already set the motion for hearing in Washington on April 8, 1959. But it now is clear to the Court that the petitioner has not given any meritorious reason for having a hearing at any place on this particular motion.

After due consideration, the motion to vacate is denied and the notice setting that motion for hearing in Washington on April 8, 1959, is cancelled.

/s/ J. E. MURDOCK,  
Judge.

Dated: Washington, D. C., March 20, 1959.

Served March 26, 1959.

[Title of Tax Court and Cause.]

MOTION FOR REHEARING OF ORDER  
DENYING MOTION TO VACATE AND  
CANCELLING HEARING ON SAID MO-  
TION, SAID ORDER BEING MADE OR  
ENTERED ON MARCH 20, 1959

Comes now Petitioner, above-named, through its undersigned attorney, and moves the Court as follows:

1. That the above-entitled Court should reconsider its order denying the motion to vacate and cancelling the hearing thereon, which had been scheduled for April 8, 1959.

2. That, upon such reconsideration and rehearing, the hearing on the motion to vacate, which had been filed on or about March 2, 1959, should be re-scheduled for hearing in Los Angeles, California.

3. That after hearing evidence from both parties pertaining to the subject matter of said motion filed on or about March 2, 1959, the Court grant said motion, or at least, in denying the same, clearly state the specific reason why the above Court believes that it does not have jurisdiction to hear the above-entitled matter.

4. Attached hereto is a memorandum in support of this motion.

Dated: April 8, 1959.

/s/ JAMES J. ARDITTO,  
Attorney for Petitioner.

Received and filed April 13, 1959, T.C.U.S.

Denied April 14, 1959, J. E. Murdock, Judge.

Served April 15, 1959.

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In the United States Court of Appeals  
For the Ninth Circuit

Tax Court Docket No. 77084

ROSEWOOD HOTEL, INC.,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

### PETITION FOR REVIEW

Taxpayer, the Petitioner in this cause, by its attorney, James J. Arditto, hereby files its petition for a review by the United States Court of Appeals for the Ninth Circuit of the decision or order of dismissal "for lack of jurisdiction" by the Tax Court of the United States, rendered or entered on February 9, 1959, and taxpayer respectfully shows:

## I.

This petition is filed pursuant to Sections 7481, 7482 and 7483 of the Internal Revenue Code.

## II.

The Petitioner, Rosewood Hotel, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal office in Los Angeles, California.

## III.

The excess profits tax and income tax returns of the petitioner for the fiscal years ended November 30, 1954, and November 30, 1955, were filed with the District Director of Internal Revenue for the Sixth (6th) District of California at Los Angeles, California. The United States Court of Appeals for the Ninth (9th) Circuit is the Court of Appeals for the circuit in which said District Director's Office is located.

## IV.

## Nature of Controversy

The controversy involves the question of whether the Tax Court of the United States properly entered its "Order of Dismissal" for alleged lack of jurisdiction on February 9, 1959.

On or about June 12, 1958, the respondent, Commissioner of Internal Revenue, through R. A. Riddell, District Director of Internal Revenue at Los Angeles, California, mailed a Notice of Deficiency, for the taxable years ended November 30,

1954, and November 30, 1955 (for federal income and excess profits tax for the former year and federal income tax for the latter year) to petitioner and mailed the same to 3421 West Second Street, Los Angeles 4, California. This notice was returned to said District Director's Office with the words "Not known at this address" stamped on the envelope in which the said notice was mailed.

Thereafter and on July 17, 1958, this same Notice of Deficiency was personally served on one of petitioner's officers at his office at 235 North Hoover Street, Los Angeles 4, California.

On October 3, 1958, petitioner mailed its Petition for Review of such deficiency determination to the Tax Court of the United States and this petition was received and filed by the Clerk of said Tax Court on October 7, 1958.

In other words, the petition was filed with the Tax Court on or about the 113th day after the "mailing" of the Notice of Deficiency, but on or about the 82nd day after the "personal service" of said Notice of Deficiency.

The respondent, through his chief counsel, filed a Motion to Dismiss the petition for lack of jurisdiction and, as aforesaid, the Tax Court, on February 9, 1959, entered its said Order of Dismissal.

Thereafter and within thirty (30) days of the entering of said Order of Dismissal, petitioner filed, with the Tax Court, its Motion to Vacate said Order of Dismissal.

On March 20, 1959, said Motion to Vacate was denied by the Tax Court of the United States.

Thereafter and within thirty (30) days of said order denying the Motion to Vacate, petitioner filed a motion for rehearing of said Order entered on March 20, 1959, and said Motion for Rehearing was denied by the Tax Court of the United States on April 14, 1959.

The respondent claimed that the Tax Court lacked jurisdiction because petitioner failed to file its Petition for Redetermination with the Tax Court of the United States within ninety (90) days of June 12, 1958. The Tax Court granted respondent's Motion to Dismiss upon having presented to it evidence which disclosed that the statutory Notice of Deficiency was mailed to the address disclosed by the returns of petitioner for the years in question.

Petitioner, in its Motion to Vacate said Order of Dismissal, set forth and disclosed to the Tax Court of the United States that it was entirely unaware of the fact that said statutory notice had been mailed to said address until, after receiving the Order of Dismissal, petitioner's counsel talked to the Regional Counsel's Office in Los Angeles and learned for the first time that the statutory notice had been so mailed.

In further support of its Motion to Vacate the Order of Dismissal, petitioner, in effect, offered to prove that the mailing address used by the respond-

ent in so mailing said statutory notice was not the address of petitioner "last known" to the respondent, but that actually 235 North Hoover Street, Los Angeles 4, California, was the address "last known" to the respondent.

In petitioner's Motion to Vacate and in its Motion for Rehearing it asked the Tax Court to hold a hearing in Los Angeles, California, for the purpose of determining, from the evidence offered by both the petitioner and the respondent, whether the statutory notice was sent to petitioner's address "last known" to the respondent.

In its Order of March 20, 1959—denying the Motion to Vacate—the Tax Court in effect said that it made no difference whether it lacked jurisdiction because:

(1) Petitioner failed to file its Petition for Re-determination within ninety (90) days of the mailing of the statutory Notice of Deficiency to the "correct" address of petitioner; or

(2) Respondent failed to mail the statutory Notice of Deficiency to the correct "last known" address of petitioner.

#### V.

Petitioner, being aggrieved by the said Orders of February 9, 1959, March 20, 1959, and April 14, 1959, desires to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit.

## VI.

## Assignments of Error

The petitioner assigns as error the following acts and omissions of the Tax Court of the United States:

(1) Dismissing, on February 9, 1959, petitioner's Petition for Redetermination on the alleged ground that the Tax Court lacked jurisdiction because petitioner failed to file its Petition for Redetermination within ninety (90) days of the date the statutory Notice of Deficiency was mailed.

(2) Refusing to vacate said Order of Dismissal after its attention was called to the fact that it was petitioner's contention that the statutory Notice of Deficiency in question was not mailed to petitioner's address "last known" to respondent.

(3) Refusing to hold a hearing, as requested by petitioner, to hear evidence offered by petitioner which would prove that the statutory Notice of Deficiency, in question, was not mailed to the last known address of petitioner.

(4) In deciding that it made no difference whether it "lacked jurisdiction" because, on the one hand, petitioner failed to file its petition within ninety (90) days of June 12, 1958, or, on the other hand, because respondent failed to mail the statutory Notice of Deficiency to the address of petitioner last known to respondent.

(5) In deciding that the Tax Court can only



acquire jurisdiction in matters of this type if the Commissioner of Internal Revenue sends a statutory Notice of Deficiency to a taxpayer "by registered mail" to taxpayer's last known address. Further, that it cannot acquire jurisdiction where the said statutory notice is "personally served" on taxpayer and the latter within ninety (90) days thereof filing a Petition for Redetermination with the Tax Court.

/s/ JAMES J. ARDITTO,  
Attorney for Petitioner.

Duly verified.

Received and filed May 4, 1959, T.C.U.S.

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Tax Court of the United States

Motions Calendar

TRANSCRIPT OF PROCEEDINGS

Washington, D. C.,

Wednesday, February 4, 1959.

Met, pursuant to notice, at 10:00 a.m.

Before: Honorable C. Rogers Arundell, Judge.

Also Present: Honorable William M. Drennen,  
Judge.

\* \* \*

The Clerk: Docket 77084, Rosewood Hotel, Inc.  
Mr. Whitley: If the Court please—

The Clerk: Excuse me just a minute, Mr. Whitley.

The Court: All right.

Mr. Whitley: If the Court please——

The Court: I might say that there is a request for a hearing of this matter in Los Angeles. If it is solely on the question of jurisdiction, I think——

Mr. Whitley: I think that the determination of that will obviate any necessity for a hearing out there.

The Court: Go ahead.

Mr. Whitley: The respondent moves to dismiss for lack of jurisdiction on the ground that the proceeding was not timely-filed.

The deficiency notice, standard notice, was issued to the petitioner, sent by registered mail on June 12th, 1958.

Now, the 90-day period as provided by statute for the filing of the petition from determination, from that date, would expire on September 10, 1958, which was 113 days—I will go back a step further.

Under the 1954 Code if a petitioner places his proceeding, or the petition in the mail and it is postmarked, that constitutes the filing of it under the Code.

In this case the envelope bearing the petition was dated October 3, and that was 113 days after the issuance of the deficiency notice. The petition wasn't timely filed with the Court, of course, until October 7. So under either consideration the petition was late. As a matter of fact, it couldn't be timely under the 1954 Code because it was more

than 90 days after the mailing of the deficiency notice before this petition was posted.

So, more than that 90 days being involved from the time of the mailing of the deficiency notice till the petition was posted, then under the 1954 Code you can't consider the posting date but the date that it was received here. One was more than 90 days and I am going at this time to offer a photostat copy of the mailing list showing that the proceeding was, that the petition was—the ninety days was June 12, 1958—and ask the Court to dismiss the proceeding.

The Court: It is what date?

Mr. Whitley: It was June 12, 1958.

Is that admitted?

The Court: That is received.

Mr. Whitley: Very well. On the basis of that showing if the Court please, I move that the proceeding be dismissed for lack of jurisdiction.

The Court: I am going to deny the motion requesting that the hearing be transferred to Los Angeles and then grant the motion to dismiss for lack of jurisdiction.

Mr. Whitley: You of course will consider the petitioner's memorandum. It is one page; as not material at all to the issue here? But he has filed a memorandum, short memorandum in opposition?

The Court: You mean affidavit?

Mr. Whitley: It involves an affidavit, yes.

It doesn't change the factual setup at all.

The Court: All right.

Received and Filed February 5, 1959, T.C.U.S.

[Title of Tax Court and Cause.]

DOCKET ENTRIES

1958

- Oct. 7—Petition filed: Fee paid 10/7/58. Served  
Oct. 8, 1958.
- Oct. 7—Request by petr. for trial at Los Angeles,  
Calif. Served Oct. 8, 1958.  
Granted: Oct. 7, 1958.
- Oct. 7—Entry of appearance by James J. Arditto,  
for petr. Served Oct. 8, 1958.
- Dec. 8—Motion by resp. to dismiss for lack of  
jurisdiction.  
Granted: 2/9/59.
- Dec. 30—Notice of hrg. Feb. 4, 1959, Wash., D.C.,  
on resp. motion.

1959

- Feb. 2—Motion by petr. opposition to motion to  
dismiss for lack of jurisdiction.  
Denied: 2/9/59.
- Feb. 2—Motion by petr. for hearing on respond-  
ent's motion of Dec. 8, 1958, to be held in  
Los Angeles, Calif. Served Feb. 12, 1959.  
Denied: 2/9/59.
- Feb. 4—Hearing on resp. motion to dismiss.
- Feb. 5—Transcript of proceedings, Feb. 4, 1959,  
filed.
- Feb. 9—Order, that petr. request filed Feb. 2, 1959,  
is denied; resp. motion is granted and  
case is dismissed for lack of jurisdiction.

Mar. 2—Motion by petr. for hearing to be held in Los A., Calif.

Denied: 3/4/59.

Mar. 2—Motion by petr. to Vacate Order of Dismissal.

Denied: 3/20/59.

Mar. 6—Notice of Hrg. April 8, 1959, Wash., D.C., on Petr's. motion.

Mar. 16—Motion by petr. for Los Angeles hearing on motion to vacate order of dismissal be calendared at L. A. Calif.

Mar. 20—Ordered that the motion to vacate is denied and the notice setting that motion for hrg. in Wash. on April 8, 1959, is cancelled, J. Murdock. Served Mar. 26, 1959.

Apr. 13—Motion by petr. for rehearing of Order denying motion to vacate and cancelling hearing on said motion, said Order being made or entered on March 20, 1959. Served Apr. 15, 1959.

Denied: 4/14/59.

#### Appellate Proceedings

May 4—Petition for Review by U.S.C.A. 9th, filed by petr.

May 4—Designation of contents of record on rev. filed by petr.

May 4—Proof of Service of petition for rev. and designation filed.

May 5—Proof of Service of petition for rev. filed.

[Title of Tax Court and Cause.]

### CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 15, inclusive, constitute and are all of the original papers on file in my office as called for by the "Designation," including respondent's exhibit A, admitted in evidence, in the case before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court has filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case, as the same appear in the official docket in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 3rd day of June, 1959.

[Seal]      /s/ HOWARD P. LOCKE,  
Clerk, Tax Court of the  
United States.

In the United States Court of Appeals  
For the Ninth Circuit

Case No. 16509

ROSEWOOD HOTEL, INC.,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

STATEMENT OF POINTS AND DESIGNA-  
TION OF RECORD FILED PURSUANT  
TO RULE 17

Taxpayer, the Petitioner in this cause, by its attorney, James J. Arditto, hereby files its statement of points on which it intends to rely on this appeal, and its designation of the record in the Tax Court of the United States which is material to the consideration of this appeal for review, all in accordance with Subparagraph 6 of Rule 17 of the above-entitled Court:

A. Designation of Points Upon Which Petitioner  
Will Rely

The Petitioner designates the following points which it will rely upon on this appeal for review:

(1) Petitioner adopts as such designation the "Assignments of Error" contained at pages 5, 6 and 7 of the "Petition for Review" filed by the above-

named Petitioner with the Clerk of the Tax Court on or about April 30, 1959.

B. Designation of Contents of Record on Review

The Petitioner hereby designates the following as the record which is material to the consideration of the appeal for review herein:

(1) Petitioner adopts as such designation the Designation of Contents of Record on Review which it filed with the Clerk of the Tax Court on or about April 30, 1959.

Dated: June 30, 1959.

/s/ JAMES J. ARDITTO,  
Attorney for Petitioner.

[Endorsed]: Filed July 1, 1959, U.S.C.A.

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[Endorsed]: No. 16509. United States Court of Appeals for the Ninth Circuit. Rosewood Hotel, Inc., Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of the Tax Court of the United States.

Filed June 22, 1959.

Docketed: June 24, 1959.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.